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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JEWELL T. JOSEPH,

Defendant and Appellant.

A144403

(Solano County
Super. Ct. No. FCR305812)

Defendant Jewell T. Joseph appeals from an order denying his petition to recall his sentence pursuant to Penal Code¹ section 1170.18, a resentencing provision created by Proposition 47, and to reduce a prior conviction from a felony to a misdemeanor. Defendant's petition was denied upon a determination that he was not eligible for relief because the commitment offense was for violation of section 4573.8, possession of illegal substances in a jail facility (§ 4573.8), which is not one of the eligible offenses listed in section 1170.18.

Defendant's appointed appellate counsel filed a brief asking this court to conduct an independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Counsel also informed defendant of his right to file a supplemental brief.

Preliminarily, we note that whether the protections afforded by *Wende* and the United States Supreme Court decision in *Anders v. California* (1967) 386 U.S. 738 apply to an appeal from an order denying a petition brought pursuant to Proposition 47 remains

¹ All further undesignated statutory references are to the Penal Code.

an open question. Our Supreme Court has not spoken. The *Anders/Wende* procedures address appointed counsel's representation of an indigent criminal defendant in the first appeal as a matter of right and courts have been reluctant to expand their application to other proceedings or appeals. (See *Pennsylvania v. Finley* (1987) 481 U.S. 551, 557 [*Anders* review not available in post-conviction proceedings]; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 536-537 [*Anders/Wende* review not required in conservatorship proceedings]; *In re Sade C.* (1996) 13 Cal.4th 952, 981-984 [*Anders* review not required in cases affecting parental rights]; *People v. Serrano* (2012) 211 Cal.App.4th 496, 501 [*Anders/Wende* review not available to defendant facing deportation and challenging post-judgment motion to vacate judgment]; *People v. Thurman* (2007) 157 Cal.App.4th 36, 44-45 [*Anders/Wende* not applicable in post-conviction motions for a new trial].) Nonetheless, in the absence of Supreme Court authority to the contrary, we believe it prudent to adhere to *Wende* in the present case, where counsel has undertaken to comply with *Wende* requirements and defendant has filed a supplemental brief.

In his supplemental brief, defendant claims the equal protection clauses of the United States and California Constitutions are violated by section 1170.18's provision for reduction in punishment for violation of Health and Safety Code section 11350, possession of a controlled substance, but not for violation of section 4573.8, possession of illegal substances in a jail facility. However, “ ‘[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’ [Citations.]” (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Generally, “ ‘ “Persons convicted of *different* crimes are not similarly situated for equal protection purposes.” [Citations.] “[I]t is one thing to hold . . . that persons convicted of the *same crime* cannot be treated differently. It is quite another to hold that persons convicted of *different crimes* must be treated equally.” [Citation.]’ [Citation.]” (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1565.) We recognize that this is not an “absolute rule” and that a state cannot “arbitrarily discriminate between similarly situated persons simply by classifying their conduct under different criminal statutes. [Citation.]” (*People v.*

Hofsheier (2006) 37 Cal.4th 1185, 1199, overruled on other grounds in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 874.) The “inquiry is not whether persons are similarly situated for all purposes, but ‘whether they are similarly situated for purposes of the law challenged.’ [Citation.]” (*Cooley, supra*, 29 Cal.4th at p. 253.) Here, the two statutes promote two different purposes. Health and Safety Code section 11350 (former Health and Safety Code section 11500) “is designed to protect the health and safety of all persons within its borders by regulating the traffic in narcotic drugs” (*People v. Clark* (1966) 241 Cal.App.2d 775, 780); section 4573.6, on the other hand, is focused on “prison administration” (*People v. Rouser* (1997) 59 Cal.App.4th 1065, 1071; see also *Clark, supra*, 241 Cal.App.2d at p. 779.) Since the two statutes serve different purposes, defendant is not “similarly situated” to one convicted of violation of Health and Safety Code section 11350, and there is no violation of the equal protection clauses.²

Having undertaken an examination of the record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment (order) is affirmed.

² We similarly reject defendant’s contention that the trial court erred in failing to exercise its discretion under Proposition 47 to suspend defendant’s prison term or impose an alternate sentence.

REARDON, J.

We concur:

RUVOLO, P. J.

STREETER, J.